

FILED
Court of Appeals
Division II
State of Washington
8/12/2022 8:16 AM

NO. 56684-2-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

Asya Bradford,

Appellant,

v.

Department of Children, Youth & Families,

Respondent.

BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

KRISTEN S. VALORE
Assistant Attorney General
WSBA No. 51696
P.O. Box 40124
Olympia, WA 98504-0124
(360) 586-6565
Kristen.valore@atg.wa.gov
OID No. 91021

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	STATEMENT OF THE ISSUES.....	2
III.	STATEMENT OF THE CASE.....	3
	A. Ms. Bradford Requested an Administrative Hearing To Contest the Founded Findings of Abuse and Neglect.....	4
	B. The Superior Court Granted Ms. Bradford’s Petition for Judicial Review but Denied Her Request for Attorney Fees Under the EAJA	7
IV.	ARGUMENT	8
	A. Ms. Bradford Is Not Entitled To Attorney Fees Under the EAJA.....	9
	B. This Court Should Decline To Address Ms. Bradford’s Attempt To Collaterally Challenge the Validity of WAC 110-03-0270(3)(f)	17
	1. The validity of WAC 110-03-0270(3)(f) is outside the scope of Ms. Bradford’s appeal	17
	2. Because the superior court granted her petition for judicial review, Ms. Bradford is not aggrieved by WAC 110-03-0270(3)(f)	19
	3. Further, the record on appeal is insufficient for this Court to meaningfully review the validity of WAC 110-03-0270(3)(f).....	21
V.	CONCLUSION	23

TABLE OF AUTHORITIES

Cases

<i>Clark County v. W. Wash. Growth Mgmt. Hearings Bd.</i> , 177 Wn.2d 136, 298 P.3d 704 (2013).....	15, 18, 19
<i>Conway v. Dep’t of Soc. & Health Servs.</i> , 131 Wn. App. 406, 120 P.3d 130 (2005).....	9
<i>Cook v. Commellini</i> , 200 Wash. 268, 93 P.2d 441 (1939)	18
<i>Costanich v. Dep’t of Soc. & Health Servs.</i> , 164 Wn.2d 925, 194 P.3d 988 (2008).....	10
<i>Ctr. for Biological Diversity v. Dep’t of Fish & Wildlife</i> , 14 Wn. App. 2d 945, 474 P.3d 1107 (2020).....	22
<i>Dep’t of Labor & Indus. v. Lyons Enterprises, Inc.</i> , 186 Wn. App. 518, 347 P.3d 464 (2015), <i>aff’d</i> by 185 Wn.2d 721, 374 P.3d 1097 (2016).....	12
<i>Garcia v. Dep’t of Soc. & Health Servs.</i> , 10 Wn. App. 2d 885, 451 P.3d 1107 (2019).....	21
<i>Karanjah v. Dep’t of Soc. & Health Servs.</i> , 199 Wn. App. 903, 401 P.3d 381 (2017).....	11, 12
<i>Marley v. Dep’t of Labor & Indus.</i> , 125 Wn.2d 533, 886 P.2d 189 (1994).....	15
<i>Moen v. Spokane City Police Dep’t</i> , 110 Wn. App. 714, 42 P.3d 456 (2002).....	10

Cases

<i>Musselman v. Dep’t of Soc. & Health Servs.</i> , 132 Wn. App. 841, 134 P.3d 248 (2006).....	22
<i>Randy Reynolds & Assoc., Inc. v. Harmon</i> , 193 Wn.2d 143, 437 P.3d 677 (2019).....	20
<i>Raven v. Dep’t of Soc. & Health Servs.</i> , 177 Wn.2d 804, 306 P.3d 920 (2013).....	10, 12
<i>Rios-Garcia v. Dep’t of Soc. & Health Servs.</i> , 18 Wn. App. 2d 660, 493 P.3d 143 (2021).....	12
<i>Wilson v. Dep’t of Retirement Systems</i> , 15 Wn. App. 2d 111, 475 P.3d 193 (2020).....	17

Statutes

Chapter 4.84 RCW	2, 7-11, 16-17, 19, 23
RCW 4.84.340(5)	11
RCW 4.84.350(1)	11, 16
Chapter 34.05 RCW	9
RCW 34.05.570(2)	21
RCW 34.05.570(2)(c).....	21

Rules

RAP 3.1	20
RAP 5.3(a).....	18
RAP 18.1	17
RAP 18.1(a).....	16

Regulations

WAC 110-03-0020	13
WAC 110-03-0240(1)	13
WAC 110-03-0240(2)	13, 14
WAC 110-03-0270	17, 22, 23
WAC 110-03-0270(3)	12
WAC 110-03-0270(3)(a)-(e)	13
WAC 110-03-0270(3)(f)	1-2, 6, 8-9, 13-14, 16-17, 19-21

I. INTRODUCTION

Following an investigation, the Department of Children, Youth, and Families issued Asya Bradford multiple founded findings for physical abuse and neglect. Ms. Bradford administratively challenged the Department's findings. The Office of Administrative Hearings (OAH) sent notice of a prehearing conference to an address Ms. Bradford had previously provided. Ms. Bradford had since moved and did not appear at the prehearing conference. OAH subsequently entered an order of dismissal by default.

Five months after OAH entered its order of dismissal, Ms. Bradford filed a request to vacate the order. The Department Board of Appeals ultimately denied Ms. Bradford's request, reasoning its denial was required by WAC 110-03-0270(3)(f) because Ms. Bradford did not request to vacate the order within 21 days. Ms. Bradford filed a petition for judicial review, which the superior court granted. However, the superior court denied her request for attorney fees under the Equal Access to Justice

Act (EAJA), chapter 4.84 RCW. The Board was substantially justified in denying Ms. Bradford's request, and the superior court soundly exercised its discretion in denying her request for attorney fees on judicial review. To the extent Ms. Bradford challenges the validity of WAC 110-03-0270(3)(f), this Court should decline to review it. The rule's validity is outside the scope of Ms. Bradford's appeal, she is not aggrieved by the rule, and the record is insufficient for meaningful appellate review. This Court should affirm the superior court's order and deny attorney fees on appeal.

II. STATEMENT OF THE ISSUES

1. WAC 110-03-0270(3)(f) requires that the Board deny a party's request to vacate an order of dismissal that is not filed within 21 days. Ms. Bradford filed her request over four months after the deadline, and the Board's final order denying her request was consistent with the WAC and was substantially justified. Did the superior court abuse its discretion in denying Ms. Bradford attorney fees under the EAJA?
2. The validity of WAC 110-03-0270(3)(f) is beyond the scope of Ms. Bradford's appeal, and the record on appeal is insufficient for this Court's meaningful review. Should this Court decline to review Ms. Bradford's collateral challenge to the rule's validity?

III. STATEMENT OF THE CASE

On October 29, 2019, the Department issued Ms. Bradford several founded findings for physical abuse and negligent treatment or maltreatment. AR at 29-30. The Department sent written notice of the findings by certified mail to an address Ms. Bradford had provided, an address on 130th Street in Everett. AR at 29, 41. Ms. Bradford signed for and received the notice on November 8. AR at 41-42. Soon after, Ms. Bradford submitted a Review Request Form, requesting the Department's internal review of the founded findings. AR at 43. In her Review Request Form, Ms. Bradford again provided the 130th Street address—the same address where she received notice of her founded findings. AR at 43.

Upon its internal review, the Department upheld the founded findings of physical abuse and negligent treatment. AR at 44. The Department sent written notice of its determination upholding the founded findings to Ms. Bradford's 130th Street address by certified mail. AR at 45. Ms. Bradford

received the notice on December 30. AR at 45. The Department's notice provided Ms. Bradford instructions on how to request an administrative hearing to challenge her founded findings, but it did not instruct Ms. Bradford to provide her address in her written request for a hearing. CP at 55.

A. Ms. Bradford Requested an Administrative Hearing To Contest the Founded Findings of Abuse and Neglect

Ms. Bradford timely requested an administrative hearing. AR at 50. Ms. Bradford's request was enclosed in an envelope bearing a return address on Highway Place in Everett—a different address than the one where she received the Department's notifications. AR at 52. Ms. Bradford's written request for an administrative hearing did not notify OAH that her permanent address had changed. CP at 55.

OAH scheduled a Prehearing Conference for April 16, 2020, and subsequently mailed Ms. Bradford a Notice of Prehearing Conference. AR at 47. OAH sent the notice to Ms. Bradford's 130th Street address; it did not send notice to the

Highway Place address.¹ AR at 49; CP at 55. Ms. Bradford did not appear at the April 16 prehearing conference. AR at 20 (Finding 4.3). On April 16, OAH called Ms. Bradford and left a voicemail message instructing her to contact the office within 15 minutes and that if she failed to do so, she may be found in default and her administrative appeal dismissed. AR at 53. OAH called Ms. Bradford 15 minutes later, but she did not answer and did not return OAH's call. AR at 53. The next day, OAH entered an order of dismissal, finding Ms. Bradford in default because she failed to appear for the prehearing conference. AR at 53.

In mid-September—five months after OAH entered the dismissal order—Ms. Bradford sent OAH a request to vacate the order. AR at 57. In her written request to vacate, Ms. Bradford stated that she did not have permanent housing at the time of the prehearing conference and notified OAH of her new permanent address in Portland. AR at 57. Soon after, OAH scheduled a

¹ The record does not show whether OAH's notice was returned as undeliverable *See generally* AR; *see generally* CP.

prehearing conference on Ms. Bradford's request to vacate for October 27. AR at 25.

At the October 27 prehearing conference, Ms. Bradford stated that she moved from the 130th Street address in December of 2019 and also acknowledged that she had not lived at the Highway Place address. VRP at 7; AR at 7 (Finding 4.4). Ms. Bradford acknowledged receiving the order of dismissal, but the record does not indicate when she received the order. *See* CP at 56; AR at 8 (Finding 4.5). OAH entered an initial order denying the request to vacate. AR at 22.

Ms. Bradford subsequently appealed, and the Department's Board of Appeals (Board) entered a final order affirming OAH's initial order and denying the request to vacate. AR at 10. The Board concluded that because Ms. Bradford did not file her request to vacate within 21 days after the order of dismissal was issued, it was required to deny her request. AR at 10 (Conclusion 5.10). The Board noted that WAC 110-03-0270(3)(f) required that it deny a motion to vacate an order of

dismissal filed more than 21 days after the order was served and that the rule did not include a good cause exception. AR at 9 (Conclusions 5.7, 5.8).

B. The Superior Court Granted Ms. Bradford's Petition for Judicial Review but Denied Her Request for Attorney Fees Under the EAJA

Ms. Bradford filed a petition for judicial review of the Board's final order in Thurston County Superior Court, which the court granted. CP at 7-9, 54-57. The superior court found that nothing prevented OAH from mailing its Notice of Prehearing Conference to both the 130th Street and Highway Place addresses, and that the better address for OAH to use was the Highway Place address Ms. Bradford used as the return address for her administrative hearing request. CP at 55. The court concluded that Ms. Bradford did not receive proper notice of OAH's prehearing conference and reversed the Board's final order. CP at 56.

Ms. Bradford also requested attorney fees and costs under the EAJA, which the superior court denied. CP at 35, 57. The

court determined that Ms. Bradford was not entitled to attorney fees under the EAJA because the Board was substantially justified under WAC 110-03-0270(3)(f) in denying her request to vacate as Ms. Bradford did not request to vacate the dismissal order within 21 days. CP at 56. Ms. Bradford appeals the superior court's order denying her attorney fees. CP at 58.

IV. ARGUMENT

This Court should affirm the superior court's order denying Ms. Bradford attorney fees. Notwithstanding the Board's error in dismissing Ms. Bradford's administrative challenge, the Board was substantially justified in denying her motion to vacate the order of dismissal. Accordingly, the superior court did not abuse its discretion, and Ms. Bradford is not entitled to attorney fees either before the superior court or before this Court on appeal. This Court should also decline to review Ms. Bradford's attempt to collaterally attack the validity of WAC 110-03-0270(3)(f). The rule's validity is outside the

scope of her appeal, she is not aggrieved by the rule, and the record is insufficient for this Court's meaningful review.

A. Ms. Bradford Is Not Entitled To Attorney Fees Under the EAJA

WAC 110-03-0270(3)(f) requires that the Board deny a party's request to vacate an order of dismissal if the request was filed later than 21 days after the order of dismissal had been served. Ms. Bradford filed her request to vacate five months after OAH entered its order of dismissal. Accordingly, the Board was substantially justified in denying Ms. Bradford's request to vacate. The superior court soundly exercised its discretion in denying Ms. Bradford attorney fees under the EAJA, and this Court should deny her request for attorney fees on appeal.

Although this appeal arose from a Board action in which the Washington Appellate Procedure Act (APA), chapter 34.05 RCW, typically applies, the sole issue on appeal is whether Ms. Bradford is entitled to attorney fees as the prevailing party on her petition for judicial review. *See Conway v. Dep't of Soc. & Health Servs.*, 131 Wn. App. 406, 414, 120 P.3d 130 (2005)

(providing that the APA governs judicial review of final agency actions); *Moen v. Spokane City Police Dep't*, 110 Wn. App. 714, 717, 42 P.3d 456 (2002) (examining only whether a party was entitled to attorney fees under the EAJA after the party successfully challenged an administrative action). This Court reviews a superior court's decision to award or decline attorney fees under the EAJA, chapter 4.84 RCW, for an abuse of discretion. *Raven v. Dep't of Soc. & Health Servs.*, 177 Wn.2d 804, 832, 306 P.3d 920 (2013). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *Id.*

The Legislature enacted the EAJA to provide citizens a better opportunity to defend themselves in state agency actions. *Costanich v. Dep't of Soc. & Health Servs.*, 164 Wn.2d 925, 929, 194 P.3d 988 (2008). Under the EAJA, "a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorney fees, unless the court finds that the agency action was

substantially justified or that circumstances make an award unjust.” RCW 4.84.350(1).

Ms. Bradford prevailed in the superior court. CP at 54-57. Because she is a qualified prevailing party,² this Court must next determine whether the superior court abused its discretion in denying Ms. Bradford attorney fees under the EAJA after concluding that the Board’s final order was “substantially justified.” *See, e.g., Karanjah v. Dep’t of Soc. & Health Servs.*, 199 Wn. App. 903, 926, 401 P.3d 381 (2017).

“Substantially justified” means justified to such a degree that would satisfy a reasonable person. *Id.* at 927. To be substantially justified, the Department must show that its position had a reasonable basis in law and fact. *Id.* “In the administrative context, this is a difficult standard to meet. An

² A party is “qualified” when either (1) their net worth does not exceed one million dollars at the time they filed the petition for judicial review or (2) they are not the owner of a business or organization whose net worth does not exceed five million dollars. RCW 4.84.340(5). There is no dispute here that Ms. Bradford is “qualified.”

agency action may be manifestly unjust and still satisfy a reasonable person.” *Dep’t of Labor & Indus. v. Lyons Enterprises, Inc.*, 186 Wn. App. 518, 542, 347 P.3d 464 (2015), *aff’d* by 185 Wn.2d 721, 374 P.3d 1097 (2016).

Indeed, “The EAJA contemplates that an agency action may be substantially justified even when the agency’s action is ultimately determined to be unfounded.” *Rios-Garcia v. Dep’t of Soc. & Health Servs.*, 18 Wn. App. 2d 660, 674, 493 P.3d 143 (2021). Accordingly, a Department action need not be correct to be substantially justified; instead, it need only be reasonable. *Karanjah*, 199 Wn. App. at 927. An agency action that is arbitrary, willful, or capricious is not substantially justified. *Raven*, 177 Wn.2d at 832.

Under WAC 110-03-0270(3), a request to vacate an order of dismissal based on a party’s failure to attend a prehearing conference must be filed within 21 calendar days after the date the order of dismissal was served. “Any motion to vacate an order of dismissal or default that is filed more than [21] days after

the order of dismissal or default was served on the parties . . . will be denied.” WAC 110-03-0270(3)(f). Unlike other provisions in the rule, WAC 110-03-0270(3)(f) does not provide a good cause exception for failing to file a motion to vacate within 21 days. *Compare* WAC 110-03-0270(3)(a)-(e) *with* WAC 110-03-0270(3)(f).

Orders mailed by OAH “are served on the date of mailing.” WAC 110-03-0020. Parties must contact the Department and OAH to report a change to their mailing address as soon as possible. WAC 110-03-0240(1). Unless a party informed OAH of a different mailing address, it is presumed that OAH gave proper notice when it mailed its notices or orders to the party’s address on record. WAC 110-03-0240(2).

The Board’s action in denying Ms. Bradford’s motion to vacate was reasonable under WAC 110-03-0270(3)(f) and was, therefore, substantially justified. At the time OAH sent its order of dismissal, Ms. Bradford had not affirmatively notified OAH that her mailing address had changed. CP at 55. OAH mailed its

order of dismissal to Ms. Bradford's 130th Street address, the address it had on record for her, on April 17, 2020. AR at 56; *see* VRP at 5-6. According to the Department's administrative rules, OAH is presumed to have given Ms. Bradford proper notice of the dismissal order. AR at 53-56; *see* WAC 110-03-0240(2).

Ms. Bradford filed her request to vacate the order of dismissal on September 21—5 months after OAH served its order. AR at 57. Because Ms. Bradford did not file her request to vacate the order of dismissal within 21 days of OAH's order, OAH was required by administrative rule to deny her technically untimely request. WAC 110-03-0270(3)(f). The Board affirmed OAH's initial order denying Ms. Bradford's request to vacate, reasoning it was required to deny her request to vacate under WAC 110-03-0270(3)(f).

The Board's final order denying Ms. Bradford's request to vacate had a reasonable basis in law and fact, given that the petition was filed five months after service of the order of

dismissal.³ Although the superior court determined that OAH's order of dismissal by default was invalid, the Board's final order was nevertheless justified to such a degree that would satisfy a reasonable person. CP at 56. As the superior court found, Ms. Bradford filed her request to vacate the dismissal order after the 21-day deadline, which required denial under administrative rule. CP at 56. The Board was substantially justified in denying Ms. Bradford's request, and the superior court soundly exercised its discretion in denying Ms. Bradford attorney fees on judicial

³ Ms. Bradford suggests that OAH lacked subject matter jurisdiction by not providing her proper notice of the prehearing conference. *See* Am. Br. of Appellant at 17-18. Whether OAH had subject matter jurisdiction is beyond the scope of this appeal. *See Clark County v. W. Wash. Growth Mgmt. Hearings Bd.*, 177 Wn.2d 136, 145, 298 P.3d 704 (2013). Regardless, OAH acquired subject matter jurisdiction as soon as Ms. Bradford timely filed her request for an administrative hearing. *See Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994) (superseded by statute on other grounds). Whether OAH provided proper notice of the prehearing conference did not impact its subject matter jurisdiction. *See id.*

review.⁴

Ms. Bradford also requests attorney fees and costs on appeal under the EAJA. Am. Br. of Appellant at 46-47. RAP 18.1(a) provides that this Court may award a party reasonable attorney fees and expenses if applicable law grants the right to such recovery. As discussed above, Ms. Bradford should not prevail on appeal. Because Ms. Bradford did not file her request to vacate the order of dismissal within 21 days of OAH's order, and because WAC 110-03-0270(3)(f) does not provide any exceptions, the Board was required by administrative rule to affirm OAH's denial of Ms. Bradford's request. Accordingly, Ms. Bradford is not a prevailing party on

⁴ Ms. Bradford argues that the Board was not substantially justified in denying her request to vacate because it allegedly included misstatements of fact and assignments of blame in the findings and conclusions of its final order. Am. Br. of Appellant at 27-38. But Ms. Bradford does not challenge the Board's order in her appeal. Moreover, this Court need not review the Board's individual findings and conclusions when determining whether its action, the act of denying Ms. Bradford's request to vacate, was substantially justified. *See* RCW 4.84.350(1).

appeal and, as a result, is not entitled to attorney fees and costs under the EAJA and RAP 18.1. *Cf. Wilson v. Dep't of Retirement Systems*, 15 Wn. App. 2d 111, 128, 475 P.3d 193 (2020).

B. This Court Should Decline To Address Ms. Bradford's Attempt To Collaterally Challenge the Validity of WAC 110-03-0270(3)(f)

Ms. Bradford argues, for the first time, that WAC 110-03-0270(3)(f) is invalid, arbitrary and capricious, and unconstitutional. Am. Br. of Appellant at 44-45. This Court should decline to address Ms. Bradford's argument. It is beyond the scope of her appeal, Ms. Bradford is not aggrieved by WAC 110-03-0270, and the record on appeal is insufficient for this Court's meaningful review of the rule's validity.

1. The validity of WAC 110-03-0270(3)(f) is outside the scope of Ms. Bradford's appeal

Ms. Bradford's notice of appeal and assignments of error challenge only the superior court's order denying her attorney fees under the EAJA. Ms. Bradford prevailed on her petition for judicial review below, and her challenge to the validity of WAC 110-03-0270(3)(f) is outside the scope of her appeal.

“An appellate court’s review is necessarily limited by the scope of a given appeal.” *Clark County v. W. Wash. Growth Mgmt. Hearings Bd.*, 177 Wn.2d 136, 145, 298 P.3d 704 (2013). Appellate courts undertake review only to resolve actual and residual disputes between the parties. *Id.* at 146; *see also Cook v. Commellini*, 200 Wash. 268, 270-71, 93 P.2d 441 (1939) (stating it is “a well-established rule that, on appeal from only a part of a judgment or decree, the court may not review rulings which do not affect the part appealed from.”). The scope of an appeal is determined by the notice of appeal, the assignments of error, and the parties’ substantive arguments. *Clark County*, 177 Wn.2d at 144. An appellant’s notice of appeal must designate the decision or part of a decision that the party wants reviewed. RAP 5.3(a); *see Clark County*, 177 Wn.2d at 144-45. After a decision or part of a decision has been identified in the notice of appeal, the assignments of error and the parties’ substantive arguments further narrow the claims and issues on appellate review. *Clark County*, 177 Wn.2d at 145.

Here, Ms. Bradford's notice of appeal designated only the superior court's denial of attorney fees under the EAJA; it makes no mention of the Board's underlying final order, which the superior court reversed upon Ms. Bradford's successful petition for judicial review. CP at 58; *see* CP at 54-57. In her briefing to this Court, Ms. Bradford assigns error to only the superior court's order denying her attorney fees. Am. Br. of Appellant at 1. Despite this, Ms. Bradford attempts to collaterally attack the Board's reversed final order by arguing for the first time before this Court that WAC 110-03-0270(3)(f) is invalid. The validity of the Department's rule is neither an actual nor residual dispute for this Court's review. *See Clark County*, 177 Wn.2d at 146. Ms. Bradford's argument is outside the scope of her appeal, and this Court should decline to review it.

2. Because the superior court granted her petition for judicial review, Ms. Bradford is not aggrieved by WAC 110-03-0270(3)(f)

The Rules of Appellate Procedure permit only parties who are "aggrieved" to appeal, and because the superior court

reversed the Board's final order, Ms. Bradford is not aggrieved here.

RAP 3.1 provides that “[o]nly an aggrieved party may seek review by the appellate court.” Although the rules do not define the term “aggrieved,” in general a party is aggrieved when the trial court’s decision adversely “affects the party’s property or pecuniary rights, or a personal right, or [if the decision] impose[s] on a party a burden or obligation.” *Randy Reynolds & Assoc., Inc. v. Harmon*, 193 Wn.2d 143, 150, 437 P.3d 677 (2019) (citations omitted). Parties are not “aggrieved by a favorable decision and cannot properly appeal from such a decision.” *Id.*

In this case, Ms. Bradford is in no way aggrieved by the superior court’s application of WAC 110-03-0270(3)(f) to her petition for judicial review. Her arguments about the timeliness of her request to vacate the Board’s final order were successful, and although Ms. Bradford is aggrieved by the superior court’s denial of her request for attorney fees, she has no personal,

property, or pecuniary rights under the Department's hearing rules left to vindicate on appeal. The superior court's decision was favorable and, thus, cannot be properly appealed. Ms. Bradford's attempt to collaterally attack the validity of WAC 110-03-0270(3)(f) should fail.

3. Further, the record on appeal is insufficient for this Court to meaningfully review the validity of WAC 110-03-0270(3)(f)

The appellate record is also insufficient for this Court's meaningful review of WAC 110-03-0270(3)(f). The official rulemaking file for an agency rule is necessary for effective judicial review and is not part of the record in this appeal.

The APA standard set out in RCW 34.05.570(2) governs this Court's review of the validity of the Department's rules. *Garcia v. Dep't of Soc. & Health Servs.*, 10 Wn. App. 2d 885, 908, 451 P.3d 1107 (2019). Under RCW 34.05.570(2)(c), a court must declare a rule invalid only if it finds that: "The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with

statutory rule-making procedures; or the rule is arbitrary and capricious.” Under the APA, an agency must maintain an official rulemaking file for each rule that it proposes or adopts. *Ctr. for Biological Diversity v. Dep’t of Fish & Wildlife*, 14 Wn. App. 2d 945, 965, 474 P.3d 1107 (2020). An appellate court must consider the agency’s official rulemaking file, as well as the agency’s explanations for adopting the challenged rule, when reviewing a rule’s validity. *Id.* The official rulemaking file is necessary for effective judicial review because it contains information the agency considered when adopting the rule. *Musselman v. Dep’t of Soc. & Health Servs.*, 132 Wn. App. 841, 854, 134 P.3d 248 (2006). Consequently, an appellate court cannot meaningfully review a challenged rule without the official rulemaking file. *Id.*

Here, the Department’s official rulemaking file for WAC 110-03-0270 is not in the record on appeal. *See generally* AR. Thus, the appellate record is insufficient for this Court’s

meaningful review, and this Court should decline to review the validity of WAC 110-03-0270.

V. CONCLUSION

The Board's final order denying Ms. Bradford's request to vacate was substantially justified because denial was required by administrative rule. Accordingly, Ms. Bradford was not entitled to attorney fees under the EAJA before the superior court, despite prevailing on her petition for judicial review. Because the superior court soundly exercised its discretion in denying Ms. Bradford's request for attorney fees, she is not a prevailing party and is not entitled to attorney fees on appeal. The Department respectfully requests that this Court affirm the superior court's order and deny attorney fees on appeal.

//

//

//

//

This document contains 3,995 words, excluding the parts
of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 12th day of August,
2022.

ROBERT W. FERGUSON
Attorney General



KRISTEN S. VALORE
WSBA No. 51696
Assistant Attorney General
P.O. Box 40124
Olympia, WA 98504-0124
(360) 586-6565
OID No. 91021

PROOF OF SERVICE


I certify that I caused to have served a true and correct copy of the foregoing document on all parties or their counsel of record on the date below as follows:

Gary A. Preble
Attorney at Law
2120 State Ave. NE
Olympia, WA 98506-6515

☐ U.S. Mail
☒ Email via Appellate Courts
Portal: gary@preblelaw.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 12th day of August, 2022 at Olympia, Washington.



Kristen S. Valore
Assistant Attorney General

SOCIAL AND HEALTH SERVICES DIVISION, ATTORNEY GENERALS OFFICE

August 12, 2022 - 8:16 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 56684-2
Appellate Court Case Title: Asya Bradford, Appellant v. Department of Children, Youth & Families, Respondent
Superior Court Case Number: 21-2-00071-5

The following documents have been uploaded:

- 566842_Briefs_20220812081337D2461171_3344.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Response_081222.pdf

A copy of the uploaded files will be sent to:

- gary@preblelaw.com
- office@preblelaw.com
- ursula.konschakgrover@atg.wa.gov

Comments:

Brief of Respondent

Sender Name: Ursula Konschak-Grover - Email: ursulak@atg.wa.gov

Filing on Behalf of: Kristen Stallion Valore - Email: kristen.valore@atg.wa.gov (Alternate Email: shsappealnotification@atg.wa.gov)

Address:
P.O. Box 40124
Olympia, WA, 98504-0124
Phone: (360) 586-6565

Note: The Filing Id is 20220812081337D2461171